

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION**

NORTHWEST HUMAN SERVICES
OF PENNSYLVANIA¹

Employer

and

Case 4–RC–19726

PENNSYLVANIA SOCIAL SERVICES UNION,
SERVICE EMPLOYEES INTERNATIONAL UNION,
LOCAL #668²

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The labor organization involved claim to represent certain employees of the Employer.

¹ The name of the Employer appears as amended at the hearing.

² The name of the Petitioner appears as amended at the hearing.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The Employer is a Pennsylvania non-profit corporation engaged in providing mental health and other services and treatments to residents and individuals at various locations throughout Pennsylvania, including the Allentown Secure Treatment Unit (ASTU) located at 1560 Hanover Avenue, Allentown, Pennsylvania, the facility involved herein. ASTU is a division of Northwest Youth Services which is a division of the Employer. The parties stipulated that the appropriate unit should include all full-time and regular part-time youth development counselors, maintenance employees and food preparation employees, excluding the executive director, the assistant executive director, the secretary to the executive director, the coordinator of medical services, the clinical coordinator, professional employees, guards and supervisors as defined by the Act. The parties disagree as to the unit placement of the Shift Supervisors and Assistant Shift Supervisors. The Employer, contrary to the Petitioner, would exclude the Shift Supervisors and Assistant Supervisors from the unit as supervisors within the meaning of Section 2(11) of the Act.

ASTU is a private youth development center licensed by the Commonwealth of Pennsylvania and governed by state regulations for residential treatment facilities for youths and for secured treatment facilities. ASTU, a 16 bed secured youth development center, is located in a two floor facility that operates 24 hours a day, 7 days a week. There are three eight hour shifts starting at 7:00 A.M., 3:00 P.M., and 11:00 P.M., and a swing shift. The first floor of the building is divided into a wing for the students' education and a wing containing their residences, a few administrative offices, a conference room to meet with families, medical services, bathroom facilities, the records room and the staff communication room. The basement houses the recreation room, dinning room, weight room, maintenance office, clinical specialist office, and the kitchen and food preparation area.

ASTU's contract with the Commonwealth of Pennsylvania requires a minimum ratio of one staff person to four students at all times. The students, who range in age from 13 to 21, are adjudicated delinquents who have engaged in serious criminal or violent behavior and are placed in this facility for indefinite sentences by the courts.

The Executive Director of ASTU, Richard D. Thomas, is responsible for the overall operation of the facility. The Assistant Executive Director, Nick Gharzouzi, reports to Thomas and oversees functions and duties of the Shift Supervisors. The Clinical Counselor is the third in the chain of command. As mandated by state regulations, one of these three administrators is on call at all times.

The Employer employs four Shift Supervisors, four Assistant Shift Supervisors and 10 Youth Development Counselors (YDCs). The Shift Supervisors report directly to the Assistant Executive Director. The record is unclear as to whether the Assistant Shift Supervisors and the YDCs report solely to the Shift Supervisors or whether they also report to the Assistant Executive Director. The Coordinator of Medical Services, the Clinical Coordinator, the

maintenance employees and food preparation employees all report to Executive Director Thomas.

During any shift, a Shift Supervisor, an Assistant Shift Supervisor and two or three YDCs are on duty. The Shift Supervisors, the Assistant Shift Supervisors and the YDCs each have primary responsibility for a group of four children. They monitor the children's activities and implement parts of their treatment. Each is also responsible for the safety and security of the children and the facility. While specific tasks may vary depending on the shift, they generally include the following: perimeter indoor and outdoor safety checks; 15 minute checks of the children throughout the night; mechanical restraint counts; monitoring showers; inner office cleanliness checks; medicine counts; distributing medications to children; and, monitoring the children to ensure that they perform their kitchen chores.

The Shift Supervisor serves as the shift's team leader. They are responsible for signing shift logs which contain information concerning the work done on the shift and information concerning the events that took place on the shift. The Shift Supervisors contact the on-call Administrator when a child needs to be restrained or when other significant events occur. They make sure that all duties assigned to the shift have been performed and relay information and policy given to them by management to their respective shifts.

The assignment of duties on a shift varies according to the team and the Shift Supervisor. Some shifts rotate the duties among the four shift members, including the Shift Supervisor. On other shifts, the shift members generally perform the same tasks day after day. The distribution of medications requires employees to receive several days of training at the facility. As a consequence, the same one or two shift members perform this task. If a YDC fails to complete an assigned task, the Shift Supervisor may complete the task him/herself and report the matter to the Assistant Executive Director.

The Shift Supervisors attend bi-monthly management meetings and meetings with the Assistant Executive Director. The purpose of the bi-monthly management meetings, which are attended at least by the Executive Director, Assistant Executive Director and Shift Supervisors, is to gather information, address staff concerns and discuss issues of policy and procedure. The meetings with the Assistant Executive Director are attended by the Shift Supervisors. These meetings are designed for sharing information regarding the concerns of shift members. The Assistant Shift Supervisors attend the monthly management meetings if the Shift Supervisor is unable to attend. YDCs have also attended these meetings in the absence of a Shift Supervisor or Assistant Shift Supervisor. They attend in order to relay information to their shifts. Shift Supervisors conduct informal team meetings and sign incident reports. Incident reports record unusual events that occur on the shift and are signed by the Shift Supervisor, the individual who observed the incident and either the Executive Director or Assistant Executive Director.³ According to Executive Director Thomas, Assistant Shift Supervisors substitute for Shift Supervisors approximately 15% of the time.

³ The record does not contain copies of incident reports.

The Shift Supervisors receive \$9.56 per hour, Assistant Shift Supervisors receive \$9.04 per hour, and YDCs earn \$8.56 per hour. Some YDCs are paid more than Shift Supervisors because of their special training.⁴ While not all Shift Supervisors meet the requirements, the job description provides that Shift Supervisors should have a two or four year college degree plus two years of supervisory experience working with adolescents with behavioral problems. Shift Supervisors may work as YDCs on other shifts and when they do, they receive overtime. All employees at the facility receive the same medical benefits, pension plan, vacation time, and sick leave.

The Assistant Executive Director is responsible for the scheduling and overseeing any changes to the schedule for the YDCs, Shift Supervisors and Assistant Shift Supervisors. All vacation, time off, and shift change requests are made to, and approved by, the Assistant Executive Director. Overtime is approved by the Assistant Executive Director or the on-call administrator. There is conflicting record evidence as to whether Shift Supervisors contact YDCs directly to ask if they will come in to work if a shift is understaffed. However, the record evidence shows that the Shift Supervisor is required to contact the on-call administrator if the shift is understaffed.

The Executive Director is responsible for the imposition of discipline. While Executive Director Thomas testified that Shift Supervisors have the authority to impose discipline, the only testimony he gave regarding this authority involved telling a YDC to “tap out” and take a walk.⁵ Thomas later testified that “tapping out” is not disciplinary. Shift Supervisors testified that they have never disciplined employees and do not believe they have the authority to do so. Shift Supervisors may report incidents involving other staff members to the Assistant Executive Director. Shift Supervisor Brian Starks and former Assistant Shift Supervisor Michael Edelman testified that their reports and recommendations to the Assistant Executive Director regarding failure of a YDC to complete an assigned task and sleeping on the job did not result in discipline of the employee. According to Starks, one of the members of his team was suspended and he played no part in the disciplinary process.

A finding of supervisory status is warranted only where the individuals in question possess one or more of the indicia set forth in Section 2(11) of the Act. *Providence Hosp.*, 320 NLRB 717, 725 (1996), *enfd.* 121 F.3d 548, 156 LRRM 2001 (9th Cir. 1997); *The Door*, 297 NLRB 601 (1990); *Phelps Community Med. Ctr.*, 295 NLRB 486, 489 (1989). The statutory criteria are read in the disjunctive, and possession of any one of the indicia listed is sufficient to make an individual a supervisor. *Providence Hosp.*, *supra*, 320 NLRB at 725; *Juniper Indus.*, 311 NLRB 109, 110 (1993). However, the statutory definition specifically indicates that it applies only to individuals who exercise “independent judgment” in the performance of supervisory functions and who act in the interest of the employer. *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571, 574, 146 LRRM 2321, 2322 (1994); *Clark Machine Corp.*, 308 NLRB 555 (1992). The Board analyzes each case in order to differentiate between the exercise of independent judgment and the providing of routine instructions, between effective

⁴ The record does not indicate the nature of this training.

⁵ YDCs may also tell other employees to “tap out.”

recommendation and forceful suggestions, and between the appearance of supervision and supervision in fact. *Providence Hosp.*, supra, 320 NLRB at 725. The exercise of some supervisory authority in a merely routine, clerical or perfunctory manner does not confer supervisory status on an employee. *Id.*; *Juniper Indus.*, supra, 311 NLRB at 110. The authority effectively to recommend “generally means that the recommended action is taken with *no* independent investigation by superiors, not simply that the recommendation ultimately is followed.” *ITT Lighting Fixtures*, 265 NLRB 1480, 1481 (1982) (emphasis in original). The sporadic exercise of supervisory authority is not sufficient to transform an employee into a supervisor. *Robert Greenspan, DDS*, 318 NLRB 70 (1995), enfd. mem. 101 F.3d 107, 153 LRRM 2704 (2nd Cir. 1996), cert. denied 117 S.Ct. 68, 153 LRRM 2736 (1996), citing *NLRB v. Lindsay Newspapers*, 315 F.2d 709, 712 (5th Cir. 1963); *Gaines Electric*, 309 NLRB 1077, 1078 (1992); *Ohio River Co.*, 303 NLRB 696, 714 (1991), enfd. 961 F.2d 1578, 140 LRRM 2120 (6th Cir. 1992). Job descriptions or job titles suggesting the presence of supervisory authority are not given controlling weight. Rather, the Board insists on evidence supporting a finding of actual as opposed to mere paper authority. *East Village Nursing Center v. NLRB*, 165 F.3d 960, 160 LRRM 2342, 2345–2346 (D.C. Cir. 1999); *Store Employees Local 347 v. NLRB*, 422 F.2d 685, 71 LRRM 2397, 2399–2400 (D.C. Cir. 1969); *NLRB v. Security Guard Services*, 384 F.2d 143, 66 LRRM 2247–2250 (5th Cir. 1969), enfg. 154 NLRB 8 (1965); *North Miami Convalescent Home*, 224 NLRB 1271, 1272 (1976).

The burden of establishing supervisory status is on the party asserting that such status exists. *St. Francis Med. Ctr.-West*, 323 NLRB 1046, 1047 (1997). The Board has cautioned that the supervisory exemption should not be construed too broadly because the inevitable consequence of such a construction would be to remove individuals from the protections of the Act. *Providence Hosp.*, supra, 320 NLRB at 725. Where the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established, at least on the basis of those indicia. *Phelps Community Med. Ctr.*, supra, 295 NLRB at 490. The legislative history of Section 2(11) makes clear that Congress intended to distinguish between employees performing minor supervisory duties and supervisors vested with genuine management prerogatives, and did not intend to remove individuals in the former category from the protections of the Act. S. Rep. No. 105, 80th Cong., 1st Sess., 4 (1947), reprinted in 1 Legis. Hist. 407, 410 (LMRA 1947). The legislative history also demonstrates that Congress considered true supervisors to be different from lead employees or straw bosses who merely provide routine direction to other employees as a result of superior training or experience. *Id.*, reprinted at 1 Legis. Hist. at 410 (LMRA 1947). *Providence Hosp.*, supra, 320 NLRB at 725; *Ten Broeck Commons*, 320 NLRB 806, 809 (1996). An individual will not be found to be a supervisor unless he or she has a “kinship to management.” *Adco Electric*, 307 NLRB 1113 fn. 3 (1992), enfd. 6 F.3d 1110, 144 LRRM 2763 (5th Cir. 1993); *NLRB v. Security Guard Service*, supra, 66 LRRM at 2250. Further, “supervisory direction” of other employees must be distinguished from direction incidental to an individual’s technical training and expertise, and technical employees will not be found to be supervisors merely because they direct and monitor support personnel in the performance of specific job functions related to the discharge of their duties. *Robert Greenspan, DDS*, supra, 318 NLRB at 76; *New York Univ.*, 221 NLRB 1148, 1156 (1975).

Applying these principles to the instant case, I find that the Employer has not satisfied its burden of showing that Shift Supervisors and Assistant Shift Supervisors are supervisors within the meaning of Section 2(11) of the Act. As to the matter of discipline, it is clear from the record that discipline of YDCs is decided and administered by the Executive Director and Assistant Executive Director. There is no evidence that Shift Supervisors have issued written disciplinary warnings or given verbal reprimands to YDCs. While Shift Supervisors sign incident reports, these reports record significant events which transpired on the shift and are also signed by the witness to the event and the Executive Director or Assistant Executive Director. According to the Employer's Executive Director, telling a YDC to "tap out" and take a walk does not constitute discipline. While Shift Supervisors and Assistant Shift Supervisors occasionally report the conduct of a shift member, there is no evidence that these reports result in discipline. Similarly, there is no record evidence that the Shift Supervisors or Assistant Shift Supervisors effectively recommend discipline. Thus, the record shows that the recommendations made by a Shift Supervisor and Assistant Shift Supervisor were not followed.

In *NLRB v. Attleboro*, 176 F.3d 154 (3rd Cir. 1999), the Third Circuit held that an LPN's decision making authority to counsel an offending employee verbally or to initiate a progressive disciplinary process, by issuing a disciplinary notice, amounts to effectively recommending discipline using independent judgment, despite the fact the recommendations were later reviewed and investigated by the Director. The Court in *Attleboro* found it significant that the LPNs initiated a progressive disciplinary process by issuing a written warning to an employee. In the subject case, there is no evidence concerning the Employer's disciplinary policy, and no evidence that the verbal reports referred to above set in motion any disciplinary proceeding. See *S.S. Joachim & Anne Residence*, 314 NLRB 1191, 1195 (1994). Accordingly, I find that the Employer has not met its burden of establishing that Shift Supervisors and Assistant Shift Supervisors have the authority to impose or effectively recommend discipline in the exercise of independent judgment within the meaning of Section 2(11) of the Act. *Ten Broeck Commons*, supra, 320 NLRB at 809 (1996); *Northcrest Nursing Home*, 313 NLRB 491, 497 (1993); *Hydro Conduit Corp.*, 254 NLRB 433 (1981); *Florida Steel Corp.*, 220 NLRB 225, 227 (1975), *enfd.* in relevant part 544 F.2d 896, 94 LRRM 2237 (5th Cir. 1997).

With respect to the Shift Supervisors' and Assistant Shift Supervisors' ability to assign and to direct the YDCs, I find that the evidence does not support the conclusion that they exercise independent judgment as to these statutory indicia. The Shift Supervisors have no authority to assign the YDCs to work certain shifts or to work overtime. All issues involving scheduling, shift changes, and overtime are approved by the Assistant Executive Director or the on-call Administrator. While a Shift Supervisor may have the responsibility to find necessary replacements if the shift is understaffed, they contact the on-call administrator. As to the daily tasks that are completed by all shift members, except for the distribution of medication which requires a few days of training at the facility, the tasks are not of such a complicated nature as to require special skills or experience.

In *Attleboro*, the Court found that LPNs in that case had power to reorganize the schedule or request additional employees in the case of an emergency which, by itself, established that LPN charge nurses exercised authority to assign and direct employees using independent judgment. In the subject case, the Shift Supervisors do not have the authority to reorganize the

schedule. While the Shift Supervisor contacts the on-call administrator to request additional staff members when a shift is understaffed, this does not require the use of independent judgment as ASTU is required to maintain a specific child to employee ratio.

Finally, neither the fact that Shift Supervisors attend meetings with the Executive Director or the Assistant Executive Director, nor the fact that at times they are the highest ranking person at the facility is sufficient to support a finding of statutory supervisory status. When there is no evidence that an individual possesses one of the several primary indicia for statutory supervisory status, the secondary indicia are insufficient by themselves to establish statutory supervisory status. *J.C. Brock Corp.*, 314 NLRB 157-9 (1994); *St. Alphonsus Hosp.*, 261 NLRB 620, 626 (1982). See *Northcrest Nursing Home*, supra, 313 NLRB at 500 and n. 45.

Based on the forgoing, I find that the Employer has not satisfied its burden of proving that the Shift Supervisors and Assistant Shift Supervisors possess the indicia of supervisory status set forth in Section 2(11) of the Act. Accordingly, I shall include them in the unit.

I find the following employees of the Employer constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time youth development counselors, shift supervisors, assistant shift supervisors, maintenance employees and food preparation employees employed by the Employer at the Allentown Secure Treatment Unit, Allentown, Pennsylvania, excluding all other employees, the executive director, assistant executive director, secretary to the executive director, coordinator of medical services, clinical coordinator, professional employees, guards and supervisors as defined by the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently,⁶ subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of the issuance of the Notice of Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll

⁶ Your attention is directed to Section 103.20 of the Board's Rules and Regulations, a copy of which is enclosed. Section 103.20 provides that the Employer must post the Board's official Notice of Election at least three full working days before the election, excluding Saturdays and Sundays and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by

**PENNSYLVANIA SOCIAL SERVICES UNION, SERVICE
EMPLOYEES INTERNATIONAL UNION, LOCAL #668**

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision 3 copies of an election eligibility list, containing the **full** names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be clearly legible, and computer-generated lists should be printed in at least 12-point type. In order to be timely filed, such list must be received in the Regional Office, One Independence Mall, 615 Chestnut Street, Seventh Floor, Philadelphia, Pennsylvania 19106, on or before **August 12, 1999**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 14th Street, N.W., Room 11613, Washington, D.C. 20570. This request must be received by the Board in Washington by **August 19, 1999**.

Signed August 5, 1999

at Philadelphia, PA

/s/ Dorothy L. Moore-Duncan
DOROTHY L. MOORE-DUNCAN
Regional Director, Region Four

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